(Slip Opinion)

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BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:	)	
SchoolCraft Construction, Inc.	)	CAA Appeal No. 98-3
Docket No. CAA-010A-1993	)	

[Decided July 7, 1999]

FINAL ORDER

Before Environmental Appeals Judges Ronald L. McCallum, Edward E. Reich, and Kathie A. Stein.

SCHOOLCRAFT CONSTRUCTION, INC.

CAA Appeal No. 98-3

FINAL ORDER

Decided July 7, 1999

Syllabus

This is an appeal by SchoolCraft Construction Company, Inc. ("SchoolCraft") from a Decision Following Remand dated June 23, 1998. This matter arises out of an administrative enforcement action filed against SchoolCraft by the Director of the Air and Radiation Division, U.S. Environmental Protection Agency Region V ("Region"). By the Decision Following Remand, the Presiding Officer held SchoolCraft liable for five violations of Clean Air Act ("CAA") § 112, 42 U.S.C. § 7412, and assessed an aggregate penalty for those violations of $20,000.

Section 112 of the Clean Air Act lists asbestos as a "hazardous air pollutant" and requires the EPA to adopt emission standards for its control. Under this authority, the EPA has promulgated National Emission Standards for Hazardous Air Pollutants for asbestos (the "Asbestos NESHAP"), which imposes upon "owners" and "operators" of demolition or renovation activities certain notification requirements and work practice standards.

In June 1993, the Region filed a complaint (the "Complaint") against SchoolCraft and Seneca Asbestos Removal and Control, Inc. ("Seneca") for violations of the Asbestos NESHAP that allegedly occurred during a renovation project at the C.O. Cline Elementary School ("Cline Elementary"), which is owned by Centerville, Ohio City Schools ("Centerville"). The Complaint alleged five violations that are at issue in this appeal: Counts I and II – failure to provide timely written and telephone notice required by the Asbestos NESHAP that asbestos removal would begin on a date later than the date specified in the original notice of renovation; Counts III and IV – failure to adequately wet regulated asbestos-containing material ("RACM") being stripped from the facility and ensure that it remained wet until collected and contained or treated in preparation for disposal; and Count V – failure to post evidence of the on-site representative's training in the Asbestos NESHAP. The Complaint alleged that both

SchoolCraft and Seneca were "operators" of the renovation project and were liable for the violations.

On January 2, 1997, the administrative law judge issued his Initial Decision in this matter dismissing the Complaint against SchoolCraft on the grounds that it was not an "owner" or "operator" within the meaning of the Asbestos NESHAP. The Region thereafter appealed to this Board and, in February 1998, the Board entered an order reversing the dismissal of the Complaint and remanding this matter for further proceedings. *See In re SchoolCraft, Inc.*, CAA Appeal No. 97-1 (EAB, Feb. 9, 1998) ("*SchoolCraft I*").

On remand, a substitute administrative law judge was appointed, who issued his Decision Following Remand on June 23, 1998, holding SchoolCraft liable for the charged violations and assessing a penalty of $20,000. SchoolCraft has now appealed. In this appeal, SchoolCraft raises issues regarding whether the Region established, by a preponderance of the evidence, that the violations occurred, and whether SchoolCraft should have been assessed penalties of $20,000 for the violations.

HELD: (1) Regarding Counts I and II, the regulations clearly place the responsibility for providing the required telephone and written notice on "each" operator. Since *SchoolCraft I* held that SchoolCraft was an operator of the Cline Elementary renovation project and since SchoolCraft does not challenge the finding that the revised notices were not given at the required times, it therefore follows that SchoolCraft is liable for the failure to provide the telephone and written notices required by the regulations.

(2) Regarding Counts III and IV, it is not necessary for the Region to show that actual asbestos emissions occurred; the testimony of the Region's witness that he saw recently stripped, dry RACM was sufficient evidence to establish that the RACM was not adequately wet to prevent releases of asbestos particles. Also, SchoolCraft cannot rely upon Seneca's contractual agreement to perform the asbestos removal work to show that SchoolCraft should not be held liable for the failure to adequately wet RACM.

(3) SchoolCraft is liable for the violation charged in Count V because the on-site representative's training certification was not located on-site on the day of the inspection as required by the Asbestos NESHAP.

(4) The penalty assessed by the Presiding Officer is upheld. SchoolCraft has not shown that the Presiding Officer abused his discretion or committed any clear error in his analysis and the penalty assessed by the Presiding Officer falls within the range of penalties suggested by the applicable Agency penalty policy.

Before Environmental Appeals Judges Ronald L. McCallum, Edward E. Reich, and Kathie A. Stein.

Opinion of the Board by Judge Reich:

This is an appeal by SchoolCraft Construction Company, Inc. ("SchoolCraft") from a Decision Following Remand dated June 23, 1998, entered in the above-captioned matter by Administrative Law Judge Edward J. Kuhlmann (the "Presiding Officer"). This matter arises out of an administrative enforcement action filed against SchoolCraft by the Director of the Air and Radiation Division, U.S. Environmental Protection Agency Region V ("Region"). By the Decision Following Remand, the Presiding Officer held SchoolCraft liable for five violations of Clean Air Act ("CAA") § 112, 42 U.S.C. § 7412, and assessed an aggregate penalty for those violations of $20,000.

The principal issues raised by SchoolCraft on appeal are whether the Region established, by a preponderance of the evidence, that the violations occurred, and whether SchoolCraft should have been assessed penalties of $20,000 for the violations. The Region has not filed its own appeal, but it does oppose SchoolCraft's appeal. For the reasons set forth below, we uphold the Presiding Officer's Decision Following Remand.

I. *BACKGROUND*

A. *Statutory and Regulatory Background*

Section 112(b)(1) of the Clean Air Act, 42 U.S.C. § 7412(b)(1), lists certain "hazardous air pollutants." Section 112(d) requires the Administrator of the United States Environmental Protection Agency (the "EPA" or "Agency") to adopt emission standards for each category of

major sources and area sources[1] of each listed hazardous air pollutant. Such emission standards can include work practice standards. CAA § 112(d)(2). These emission standards are known as National Emission Standards for Hazardous Air Pollutants ("NESHAPs"). Asbestos is a listed hazardous air pollutant and the EPA has promulgated a NESHAP for asbestos (the "Asbestos NESHAP"), which is codified at 40 C.F.R. part 61, subpart M.

The Asbestos NESHAP imposes mandatory notification requirements. The regulations also impose work practice standards when, among other circumstances, a demolition or renovation activity involves removal of at least 260 linear feet of regulated asbestos-containing material ("RACM")[2] on pipes or at least 160 square feet of

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[1]The terms "major source" and "area source" are defined at CAA § 112(a) (1) and (2). A "major source" is "any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants." *Id.* § 112(a)(1). An "area source" is "any stationary source of hazardous air pollutants that is not a major source." *Id.* § 112(a)(2).

[2]The term RACM is defined by the regulations as follows:

> Regulated asbestos-containing material (RACM) means (a) Friable asbestos material, (b) Category I nonfriable ACM that has become friable, (c) Category I nonfriable ACM that will be or has been subjected to sanding, grinding, cutting, or abrading, or (d) Category II nonfriable ACM that has a high probability of becoming or has become crumbled, pulverized or reduced to powder by the forces expected to act on the material in the course of demolition or renovation operations regulated by this subpart.

(continued...)

RACM on other components of the facility. 40 C.F.R. § 61.145(a). Where the applicable threshold for RACM has been met, section 61.145(b) sets forth specific requirements regarding notification to the EPA of renovation activity by the "owner" or "operator" of the activity. In particular, the Asbestos NESHAP requires that each owner or operator of a demolition or renovation activity provide to EPA before commencement of the asbestos activity written notice of the scheduled start date and, if the scheduled start date is changed, each owner or operator must provide to EPA, before the original start date, both telephone and written notice of the new start date. *Id.* § 61.145(b)(3)(iv)(A)(1), (2).

The Asbestos NESHAP, at section 61.145(c), also sets forth work practice standards that must be followed by owners and operators of the demolition or renovation activity where the applicable threshold amount of RACM has been met. In particular, at issue in this case are the requirements that each owner or operator "adequately wet the RACM during the stripping operation," 40 C.F.R. § 61.145(c)(3), "ensure that it remains wet until collected or treated in preparation for disposal," *id.* § 61.145(c)(6)(i), and post at the demolition or renovation site "[e]vidence that the required training [in the provisions of the Asbestos NESHAP] has been completed." *Id.* § 61.145(c)(8).

B. *Factual and Procedural Background*

In 1989, SchoolCraft was hired by Centerville, Ohio City Schools ("Centerville") to prepare Centerville's asbestos management plan, pursuant to the Asbestos Hazard and Emergency Response Act ("AHERA"), 15 U.S.C. §§ 2641-2656. While preparing this plan, asbestos-containing materials were identified at the C.O. Cline Elementary School ("Cline Elementary"), as well as other school buildings owned by Centerville. Thereafter, Centerville decided to abate

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[2](...continued)
40 C.F.R. § 61.141.

the asbestos at Cline Elementary and hired SchoolCraft to prepare the specifications for the abatement project.

Centerville used the specifications prepared by SchoolCraft to solicit bids for the Cline Elementary abatement project and, in consultation with SchoolCraft, selected Seneca Asbestos Removal and Control, Inc. ("Seneca") to perform the asbestos abatement work. Seneca was required by its contract with Centerville to comply with all project specifications and to comply with the Asbestos NESHAP, including but not limited to the applicable work practice and notification requirements. Under the project specifications, SchoolCraft was responsible for coordinating the various renovation activities at Cline Elementary, including the work of Seneca. The project specifications gave SchoolCraft substantial supervisory authority over the whole renovation project.

Seneca initially satisfied the notice requirement of the Asbestos NESHAP by informing EPA's delegate, the Regional Air Pollution Control Agency ("RAPCA"),[3] that the asbestos activity would begin on June 15, 1992, and end on August 7, 1992. However, when RAPCA inspector Jack D. Hemp went to Cline Elementary on June 16, 1992, to conduct an inspection, the work had not yet begun. On June 17, 1992, RAPCA received notification that the start date had been changed, and that the work would commence on June 17, 1992. A second inspection was thereafter conducted on June 30, 1992, by another RAPCA inspector, Jeffrey Adams.

In June 1993, the Region filed a complaint (the "Complaint") against SchoolCraft and Seneca for violations of the Asbestos NESHAP

[3]Pursuant to 40 C.F.R. § 61.04(b), EPA has delegated authority to implement and enforce the Asbestos NESHAP to state and local agencies in many locations. In Montgomery County, Ohio, where Cline Elementary is located, EPA has delegated the authority to implement and enforce the Asbestos NESHAP to a local air pollution control authority, the Regional Air Pollution Control Agency. *Id.* § 61.04(b)(KK)(vi).

that allegedly occurred during the renovation project at Cline Elementary. The Complaint alleged five violations that are at issue in this appeal:[4] Count I – failure to provide notice by telephone before the original starting date for asbestos removal that asbestos removal would begin on a date later than the date specified in the original notice of renovation, in violation of 40 C.F.R. § 61.145(b)(3)(iv)(A)(1); Count II – failure to provide written notice before the original starting date for asbestos removal that asbestos removal would begin on a date later than the start date specified in the original notice of renovation, in violation of 40 C.F.R. § 61.145(b)(3)(iv)(A)(2); Count III – failure to adequately wet RACM being stripped from the facility, in violation of 40 C.F.R. § 61.145(c)(3); Count IV – failure to adequately wet all RACM and to ensure that it remained wet until collected and contained or treated in preparation for disposal, in violation of 40 C.F.R. § 61.145(c)(6)(i); and Count V – failure to post evidence of the on-site representative's training in the Asbestos NESHAP, in violation of 40 C.F.R. § 61.145(c)(8).

The Complaint alleged that both SchoolCraft and Seneca were "operators" of the renovation project and were liable for the violations. The Complaint proposed a civil penalty of $62,000 for the five alleged violations. However, the Complaint requested that only $20,000 of the proposed penalty be assessed against SchoolCraft for its role as operator (the Complaint requested that the remaining $42,000 of the proposed penalty be assessed against Seneca).

Administrative Law Judge Daniel M. Head ("ALJ Head") held an evidentiary hearing in September 1996, and on January 2, 1997, issued his Initial Decision in this matter. *See In re Seneca Asbestos Removal & Control, Inc.*, Dkt. No. CAA-010A-1993 (ALJ, Jan. 2, 1997) (the "Initial Decision"). ALJ Head found that the dispositive issue was "whether SchoolCraft can be held liable for any NESHAP asbestos

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[4]The Complaint alleged nine counts. However, only the five counts identified above concerned work performed at Cline Elementary.

violations as an owner or operator of the renovation activities involving asbestos removal at Cline Elementary." Initial Decision at 9.

ALJ Head concluded that SchoolCraft was not an "owner" or "operator" within the meaning of the Asbestos NESHAP. Upon finding that SchoolCraft was not an owner or operator, ALJ Head held that the Region had failed to establish a *prima facie* case against SchoolCraft and, therefore, he dismissed the Complaint with prejudice pursuant to 40 C.F.R. § 22.20(a). *Id.* at 28. The Region thereafter appealed to this Board, requesting that the dismissal be reversed.

After considering the briefs of both the Region and SchoolCraft and after oral argument before the Board on July 9, 1997, the Board entered an order reversing the dismissal of the Complaint and remanding this matter for further proceedings. *See In re SchoolCraft, Inc.*, CAA Appeal No. 97-1 (EAB, Feb. 9, 1998) ("*SchoolCraft I*"). Because ALJ Head had dismissed the Complaint on the ground that the Region had failed to establish that SchoolCraft was an "operator," the Board focused its analysis on the operator issue and, upon analysis, held that SchoolCraft was an "operator" of the Cline Elementary renovation activity and, as such, was potentially liable for any violations of the Asbestos NESHAP that occurred during that activity.

However, because ALJ Head made no explicit findings as to whether or not the alleged violations actually occurred, we remanded this case to the Presiding Officer to make "specific findings of fact and conclusions on this issue." *Id.* at 26. If the violations were found to have occurred, the Presiding Officer was to consider an appropriate penalty for such violations. *Id.* at 27.

On June 23, 1998, the Presiding Officer entered the Decision Following Remand,[5] holding SchoolCraft liable for the charged violations.

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[5]The Decision Following Remand was entered by Administrative Law Judge (continued...)

To establish SchoolCraft's liability in this case, the Region was required to show by a preponderance of the evidence that: 1) SchoolCraft was an "owner or operator of a demolition or renovation activity" as defined by the asbestos NESHAP (40 C.F.R. § 61.141); 2) the amount of the RACM involved in the Cline renovation met or exceeded the applicable regulatory threshold (40 C.F.R. § 61.145(A)(4)); and 3) the alleged violations of the renovation standard actually occurred. *SchoolCraft I* at 14. Because SchoolCraft admitted that the amount of RACM involved in the renovation met or exceeded the regulatory threshold, Answer ¶ 12, and because in *SchoolCraft I* we held that SchoolCraft is an "operator" within the meaning of the Asbestos NESHAP, the Decision Following Remand focused on the remaining question of whether the Region had established the facts necessary to prove violations of the specific renovation standards as alleged in the Complaint.

In the Decision Following Remand, the Presiding Officer held that the Region had established, by a preponderance of the evidence, that each of the alleged violations had, in fact, occurred. Decision Following Remand at 3-8. The Presiding Officer, therefore, held that SchoolCraft is liable for the violations as alleged. The Presiding Officer also reviewed and extensively discussed the method by which the proposed $20,000 penalty had been calculated by the Region and, finding that the penalty was appropriate under the circumstances, the Presiding Officer assessed a civil penalty against SchoolCraft in the amount of $20,000 for the five violations of the Asbestos NESHAP. *Id.* at 9-15. SchoolCraft has now appealed from the Presiding Officer's Decision Following Remand, arguing that the Presiding Officer erred in his liability determinations and in his penalty assessment.

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[5](...continued)
Kuhlmann because ALJ Head had retired after the Initial Decision was entered. Decision Following Remand, at 1 n.1.

II. *ANALYSIS*

A. *Liability Issues*

On appeal, SchoolCraft re-raises (without additional briefing) the issue of whether it was an "operator" within the meaning of the Asbestos NESHAP in connection with the removal of asbestos at Cline Elementary. Because in *SchoolCraft I* we addressed SchoolCraft's arguments regarding whether it is an "operator," and because that ruling established the law of the case in successive stages of this same litigation, we need not discuss those arguments in this decision, noting instead that there are no grounds for reconsideration. *See In re J.V. Peters & Co.*, RCRA (3008) Appeal No. 95-2, slip op. at 22-23 (EAB, Apr. 14, 1997), 7 E.A.D. __ (discussing law of the case doctrine). In the following discussion, we consider and reject the issues raised as to whether the specific renovation standards were in fact violated as found by the Presiding Officer.

1. *Counts I and II: Whether EPA Was Properly Informed of the New Start Date as Required by 40 C.F.R. § 61.145(b)(3)(IV)(A)(1), (2)*

Counts I and II of the Complaint charged SchoolCraft with violating the Asbestos NESHAP's requirement that EPA be given both telephone and written notice of changes in the date upon which asbestos stripping or removal activity is to take place. The Asbestos NESHAP requires that each operator of a demolition or renovation activity provide to EPA written notice at least 10 working days before commencement of the asbestos activity of, among other things, the "[s]cheduled starting and completion dates of asbestos removal work." 40 C.F.R. § 61.145(b)(1), (3)(i), (4)(viii). If the activity is going to begin on a date other than the one stated in the original notice, the operator must further "notify [EPA] of the new start date by telephone as soon as possible *before* the original start date" and provide EPA "written notice of the new start date as soon as possible before, *and no later than, the original start date*." *Id.* § 61.145(b)(3)(iv)(A)(1), (2) (emphasis added).

In the Decision Following Remand, the Presiding Officer found that SchoolCraft, as an operator of the renovation activity, committed two violations of the CAA by failing to provide prior to the original start date both telephone and written notice of the new start date as required by 40 C.F.R. § 61.145(b)(3)(iv)(A)(1), (2). Decision Following Remand at 5. The Presiding Officer found that Seneca originally gave EPA notice that the removal and stripping of RACM at the Cline Elementary School would start on June 15, 1992. However, when the RAPCA inspector, Jack D. Hemp, went to inspect the removal work on June 16, 1992, the removal activity had not been started. *Id.* at 4. As of that date, RAPCA had not received telephone or written notice that the asbestos activity would not begin on the start date indicated in the original notice. *Id.* Subsequently, on June 17, 1992, RAPCA received a revised notification stating that the new start date would be June 17, 1992. *Id.*

On appeal, SchoolCraft raises a variety of arguments as to why it believes that it should not be held liable for violations of section 61.145(b)(3)(iv)(A)(1) and (2). However, none of its arguments go to the central issues of whether the required telephone and written notices of the revised start date were given at the required time (*i.e.*, prior to the date originally specified as the start date).

Instead, SchoolCraft raises a variety of extraneous issues. It suggests that the inspector could have called before conducting his inspection on June 16, 1992, in order to avoid any inconvenience caused by the inspector going to the site before the asbestos activity had started. SchoolCraft's Brief at 8. It also argues that the purpose of notice was served because RAPCA was able to conduct a subsequent inspection on June 30, 1992, at a time when the asbestos activity was on going. *Id.* at 8-9. SchoolCraft also argues that even if a "technical" notice violation occurred, the responsibility for the violation was that of Seneca, not SchoolCraft. *Id.* at 9-10.

Upon review we find the Presiding Officer's reasons for rejecting each of SchoolCraft's arguments are both sufficient and correct and, therefore, we uphold the findings of liability on Counts I and II. The

regulations clearly place the responsibility for providing the required telephone and written notice on "each" operator. 40 C.F.R. § 61.145(b). Since we held in *SchoolCraft I* that SchoolCraft was an operator of the Cline Elementary renovation project and since SchoolCraft does not challenge the finding that the revised notices were not given at the required times, it therefore follows that SchoolCraft is liable for the failure to provide the telephone and written notices required by the regulations.[6] SchoolCraft's attempts to escape liability by conjuring up arguments as to the alleged purposes or policies underlying the regulations are unavailing because such arguments cannot defeat the plain language of the regulations. In addition, we note that the policies that actually underlie the regulations are different from the policies postulated by SchoolCraft. *See* Decision Following Remand at 3-5. The Presiding Officer correctly observed that a purpose of the requirement that telephone and written notice of a change in start date be given, as stated in the preamble to the final rulemaking, is to prevent "'useless visits to jobs that have been rescheduled because a written renotification of a change in start date was not received in time."' *Id.* at 5, quoting 55 Fed. Reg. at 48,411-12. Here, the failure to provide the required notice resulted in precisely what the rule was intended to prevent: a useless visit to Cline Elementary on June 16, 1992, prior to the actual start date of the asbestos removal. *Id.* SchoolCraft is liable for the violations alleged in Counts I and II of the Complaint.

[6]We note, however, that the Region's proposed penalty for the violations alleged in Counts I and II took into account the fact that SchoolCraft was not the only operator of the project. The penalty was calculated first based upon an assigned penalty amount as if there was only one operator ($2,000), which was then divided by the number of operators (2) to arrive at the proposed penalty of $1,000 assessed against SchoolCraft for the notice violations alleged in Counts I and II. Decision Following Remand at 12.

2. *Counts III and IV: Whether All RACM Being Stripped Was Adequately Wet Before Stripping and Whether It Was Wetted to Ensure that It Would Remain Adequately Wet as Required by 40 C.F.R. § 61.145(c)(3), (6)(i)*

Counts III and IV of the Complaint charged SchoolCraft with violating the requirement that all RACM must be adequately wetted before stripping and that it must be wetted to ensure that it remains adequately wet until collected and contained or treated in preparation for disposal. 40 C.F.R. § 61.145(c)(3) and (6)(i). In essence, these work practice standards require a person engaged in the removal of asbestos-containing material to adequately wet the material prior to removal and then to keep the material adequately wet until it is collected for disposal. *In re Echevarria*, 5 E.A.D. 626, 633 (EAB 1994). The term "adequately wet" is defined in the regulations as follows:

> [S]ufficiently mix or penetrate with liquid to prevent the release of particulates. If visible emissions are observed coming from asbestos-containing material, then that material has not been adequately wetted. However, the absence of visible emissions is not sufficient evidence of being adequately wet.

40 C.F.R. § 61.141.

In the Decision Following Remand, the Presiding Officer found that, during the June 30, 1992 inspection, the RAPCA inspector, Jeffrey Adams, observed "100 feet of ceiling material in a pile approximately three feet high" and "observed that the material was dry and that it could be crumbled with his hand." *Id.* at 6. Mr. Adams testified that the material had been recently removed from the facility. *Id.* at 6-7. The Presiding Officer further noted that Mr. Adams "found no evidence of adequate wetting near the ceiling material." *Id.* at 7. In addition, the Presiding Officer found that "[r]espondent did not introduce any evidence that the asbestos material cited in count III was in any condition other

than that observed by [Mr. Adams]." *Id.* Mr. Adams took samples from the pile of ceiling material, which were tested and confirmed to contain RACM. *Id.* at 6.[7] The Presiding Officer concluded that the evidence established that the RACM was not adequately wet when stripped in violation of section 61.145(c)(3), nor was it ensured that the RACM remained adequately wet until collected and contained or treated in preparation for disposal in violation of section 61.145(c)(6)(i). *Id.* at 7.

On appeal, SchoolCraft does not challenge the factual findings identified above that underlie the Presiding Officer's liability determination. Instead, SchoolCraft argues that since the purpose of the work practice rules is to prevent the release of friable asbestos, air sampling conducted by an industrial hygienist at the same time as Mr. Adams' inspection[8] should be dispositive as to whether "there were any actual emissions." SchoolCraft's Brief at 12. SchoolCraft states further that:

> The key purpose is to prevent the release of particulates. In this instance, there was no release of particulates.

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[7]As noted *supra* note 1, RACM means, among other things, friable asbestos-containing material, which is defined as any material that contains more than 1 percent asbestos (defined to include, among other things, "asbestiform varieties of serpentinite (chrysotile)") and that can be crumbled by hand pressure. 40 C.F.R. § 61.141. The samples collected by Mr. Adams contained approximately 11-13 percent chrysotile asbestos and could be crumbled by hand. Decision Following Remand at 6.

[8]SchoolCraft points to Bates stamped pages JX0000211 through JX0000270 (Exhibit No. 8) of the parties' Joint Exhibits (admitted into evidence at page 33 of the Transcript) to support its argument that "there was, in fact, an industrial hygienist on site who was performing air sampling." SchoolCraft's Brief at 12. Because we conclude that it is not necessary to prove that asbestos has become airborne in order to show a violation of the wetting requirement, we express no opinion regarding these pages of the Joint Exhibits.

Id. at 13. Thus, SchoolCraft apparently argues that, because the air samples allegedly did not detect airborne asbestos particles, there was no violation of the wetting work-practice requirements, even though Mr. Adams observed dry RACM that had recently been stripped and had not yet been collected and contained or treated for disposal. SchoolCraft also argues that "the actual wetting of the material was Seneca's responsibility, not SchoolCraft." *Id.* at 14. We disagree with both of these arguments.

First, the Presiding Officer correctly rejected SchoolCraft's arguments regarding the air sampling, holding that the complainant is not required to prove that asbestos has actually become airborne in order to show that RACM was not adequately wet. Decision Following Remand at 7 (citing 40 C.F.R. § 61.141). This holding is in accordance with the holding in *United States v. MPM Contractors, Inc.*, 767 F. Supp. 231, 234 (D. Kan. 1990), where the court stated as follows:

> Defendant has not identified and we are not aware of any other court which has held dust emissions a prerequisite to finding that friable asbestos materials were inadequately wetted. In cases involving alleged violations of the NESHAP for asbestos, courts have routinely relied on the observations of inspectors to determine whether asbestos was adequately wetted. *See, e.g., United States v. Sealtite Corp.*, 739 F. Supp. 464, 467 (E.D. Ark. 1990); *United States v. Tzavah Urban Renewal Corp.*, 696 F. Supp. 1013, 1022 (D.N.J. 1988); *United States v. Ben's Truck & Equip.*, No. 84-1672 (E.D. Cal. May 12, 1986). The *Sealtite* court, for example, did not require the government to prove that there were emissions, but only that the asbestos was not adequately wet. State inspectors' observations that asbestos containing waste materials had not been adequately wetted was enough to hold defendant liable as a matter of law. *United States v. Sealtite*, 739 F. Supp. at 469.

This Board has similarly held that "to establish a violation of the adequately wet requirements, it is not essential for the Agency to prove that emissions occurred." *In re Echevarria*, 5 E.A.D. 626, 641 (EAB 1994), citing *MPM Contractors, supra*. The Board has also held that "the testimony of a compliance inspector regarding personal observations is sufficient to establish whether RACM has been adequately wetted." *In re Ocean State Asbestos Removal, Inc.*, CAA Appeal Nos. 97-2 and 97-5, slip op. at 13 (EAB, March 13, 1998), 7 E.A.D. __; *see also Echevarria*, 5 E.A.D. at 639-40 (same). The wetting work practice standard and the regulatory definition of "adequately wet" focus on whether asbestos releases *can* occur, not whether they actually did occur. The definition of "adequately wet" specifically states that the RACM must be mixed or penetrated with liquid "to *prevent* the release of particulates." 40 C.F.R. § 61.141 (emphasis added). The absence of asbestos particles in the air samples cannot conclusively show whether the RACM was adequately wet "to prevent" the release of asbestos; it can only show that releases were not detected at the times and locations of the sampling. Accordingly, the testimony of Mr. Adams in this case that he saw recently stripped, dry RACM was sufficient evidence to establish that the RACM was not adequately wet to prevent releases of asbestos particles.

Second, the Presiding Officer properly rejected SchoolCraft's contention that it did not have responsibility for ensuring that the RACM was adequately wet. In *SchoolCraft I*, we held that "SchoolCraft had the requisite supervisory authority over the renovation operation to be considered an 'operator' within the meaning of the asbestos NESHAP." *SchoolCraft I*, slip op. at 25. Although SchoolCraft's status as an "operator" is based upon supervisory authority established by SchoolCraft's contractual relationship with Centerville, *id*. at 18-25, the scope of SchoolCraft's responsibilities for ensuring compliance with the regulations is not governed by the *contractual* terms. Instead, once a person acquires the status of "operator," the *regulations* impose upon that person certain legal duties, including the duties at issue in Counts III and IV to adequately wet RACM during removal and to ensure that the RACM remains adequately wet. Those duties imposed by law cannot be

removed by contractual arrangements. Thus, SchoolCraft cannot rely upon Seneca's contractual agreement to perform the asbestos removal work to show that SchoolCraft should not be held liable for the failure to adequately wet RACM.[9] For these reasons, we uphold the findings of liability on Counts III and IV.

3. *Count V: Whether the On-Site Representative's Certification of Training Was Posted as Required by 40 C.F.R. § 61.145(c)(8)*

Count V of the Complaint charged SchoolCraft with violating the requirement that evidence of the required on-site representative's training be posted and made available for inspection at the renovation site. In particular, the Asbestos NESHAP requires as follows:

> [N]o RACM shall be stripped, removed, or otherwise handled or distributed at a facility regulated by this section unless at least one on-site representative, such as a foreman or management-level person or other authorized representative, trained in the provisions of this regulation and the means of complying with them, is present. * * * *Evidence that the required training has been completed shall be posted and made available for inspection by the Administrator at the demolition or renovation site*.

40 C.F.R. § 61.145(c)(8) (emphasis added).

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[9]As we noted in *SchoolCraft I*, the evidence regarding Seneca's contractual responsibilities may establish that Seneca also was an "operator" of the activity. *SchoolCraft I*, slip op. at 20, 23-24 n.19 (observing that SchoolCraft conceded that there may be more than one "operator" of a given asbestos removal activity). As noted by the Presiding Officer, the Asbestos NESHAP places responsibility for compliance on "each" owner and operator. Decision Following Remand at 5 n.2. Thus, each operator may be held liable for the violations.

In the present case, the Presiding Officer found that "there was no on-site copy of a site representative's Ohio Department of Health certificate demonstrating training in the asbestos NESHAP." Decision Following Remand at 8. Although the training certification was not located on-site, the Presiding Officer found that "Seneca did have its site supervisor's Ohio Department of Health certificate demonstrating training at its off-site office and, at Mr. Adams' request, it was sent to RAPCA by facsimile on June 30, 1992." *Id*. However, because the certification of training was not located on-site as required by the regulations, the Presiding Officer found that "Respondent's failure to post evidence of an on-site representative's training * * * at the Cline Elementary School renovation is a violation of 40 C.F.R. § 61.145(c)(8)." Decision Following Remand at 8.

On appeal, SchoolCraft does not challenge the finding that, on the day of the inspection, the training certificate for the supervisor of the asbestos activity was not located on-site. Instead, SchoolCraft argues that because the training certificate for the on-site supervisor was telefaxed to the inspector on the day of the inspection and because there is no evidence that the inspector was inconvenienced, "[t]his is certainly substantive and material compliance with this regulation." SchoolCraft's Brief at 16. SchoolCraft also argues that the contract with Seneca obligated Seneca to employ the asbestos abatement specialist to supervise the work and that, therefore, Seneca violated the regulation, not SchoolCraft. *Id*. at 16-17. We disagree.

Although the purpose of this regulation may be to prevent inconvenience to the inspector, the regulation is not drafted as an inconvenience-based standard. Instead, it is drafted as a bright-line rule requiring that the certification be located on-site. Thus, because the training certification was not located on-site on the day of the inspection, the rule was violated and SchoolCraft, as an operator of the renovation project, is liable for that violation. SchoolCraft's arguments go more appropriately to the amount of the penalty assessed and, in this context, we note that the Region reduced its proposed penalty for this violation by $10,000 to take into account the lower "gravity" of this violation.

Decision Following Remand at 11. We uphold the Presiding Officer's finding of liability for Count V of the Complaint.

B. *Penalty Issues*

Section 113(d)(1) of the Clean Air Act, 42 U.S.C. § 7413(d)(1), authorizes the assessment of civil penalties of up to $25,000 per day for each violation of the Clean Air Act. CAA § 113(d)(1), 42 U.S.C. § 7413(d)(1). The statute also specifies general criteria that must be considered by the Agency in assessing a civil penalty.[10]

In addition, pursuant to 40 C.F.R. § 22.27(b), the presiding officer must consider any civil penalty guidelines or policies issued by the Agency. The Agency has prepared a general penalty policy applicable to violations of the Clean Air Act, known as the Clean Air Act Stationary Source Civil Penalty Policy of October 25, 1991 (the "General Penalty Policy"). Attached to the General Penalty Policy as Appendix III, Asbestos Demolition and Renovation Civil Penalty Policy (revised May 5, 1992), are the specific guidelines for penalties assessed for violations of the Asbestos NESHAP (the "Asbestos Penalty Policy").

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[10]The statutory penalty criteria in relevant part are as follows:

> In determining the amount of any penalty to be assessed under this section * * *, the Administrator * * * shall take into consideration (in addition to such other factors as justice may require) the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence * * *, payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation.

CAA § 113(e), 42 U.S.C. § 7413(e).

We have generally held that, while a presiding officer must consider the Agency's official penalty policy, in any particular instance the presiding officer may depart from the Agency's penalty policy as long as the reasons for the departure are adequately explained. *In re DIC Americas, Inc.*, 6 E.A.D. 184, 190 n.10 (EAB 1995); *In re Pacific Refining Company*, 5 E.A.D. 607, 612 (EAB 1994); *In re A.Y. McDonald Industries, Inc.*, 2 E.A.D. 402, 414 (CJO 1987).

In the present case, the Region proposed a total penalty of $20,000 for the five violations alleged in Counts I through V of the Complaint. The proposed penalty was allocated among the separate violations as follows:

Counts I and II	$ 1,000
Count III	$ 4,000
Count IV	$10,000
Count V	$ 5,000

Decision Following Remand at 9.[11] The Region's proposed penalty was calculated pursuant to the guidance of the Asbestos Penalty Policy. *Id*. After extensively discussing and summarizing the evidence in this case regarding the appropriate penalty and analyzing that evidence within the framework of the Asbestos Penalty Policy, the Presiding Officer held that "Complainant's proposed penalty assessment in this case is reasonable and appropriate; it should result in deterring Respondent, and persons providing the same service to schools, from violating the NESHAP rules." The Presiding Officer, therefore, assessed the penalty proposed by the Region of $20,000 in the aggregate for SchoolCraft's five violations of the Asbestos NESHAP.

[11]The penalty proposed by the Region took into account the fact that SchoolCraft was not the only operator. *See* Decision Following Remand at 12-13 (noting that the proposed penalty of $20,000 was significantly less than the penalty of $37,000 that would have been recommended had SchoolCraft been the only operator).

On appeal, SchoolCraft argues that the penalty assessed by the Presiding Officer is "unsupported by the record and in violation of the statutory criteria." SchoolCraft's Brief at 17. SchoolCraft first emphasizes that the original presiding officer opined, even though he did not reach the issue, that no penalty should be assessed. *Id.*[12] SchoolCraft also quotes from our remand opinion in *SchoolCraft I*, where we stated that "'there may be some merit to the Presiding Officer's conclusion that the Region's proposed penalty assessment against SchoolCraft appears high when compared to the amount ultimately assessed against Seneca.'" *Id.* at 18, quoting *SchoolCraft I* at 27.[13] Noting (1) that the penalty assessed by the Presiding Officer against SchoolCraft of $20,000 is "virtually identical to the entire payment

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[12]Although he dismissed the complaint against SchoolCraft without finding liability, ALJ Head stated that even if liability were found, he would impose no penalty. He explained that no penalty would be assessed because it was Seneca who "was responsible on a substantive basis for the violations charged against SchoolCraft." Initial Decision at 30.

[13]In *SchoolCraft I*, we stated in full as follows:

> While there may be some merit to the Presiding Officer's conclusion that the Region's proposed penalty assessment against SchoolCraft appears high when compared to the amount ultimately assessed against Seneca, we have serious doubts about the Presiding Officer's decision that no penalty at all would be warranted if SchoolCraft is found liable. However, as we are remanding this matter to the Presiding Officer for a determination of whether the Region met its burden of establishing that the violations alleged in the complaint occurred, we need not reach the penalty issue at this time.

SchoolCraft I at 27. This full quote shows that our focus in *SchoolCraft I* was upon the questionable basis for the original presiding officer's dicta as to a zero penalty amount. While we recognized that there might be some merit to SchoolCraft's contention, we did not at that time have the Region's penalty analysis before us and explicitly did not reach the issue of the appropriate penalty. We now have the benefit of both the Region's analysis and the Presiding Officer's thoughtful decision.

to SchoolCraft" of approximately $22,000, (2) that Seneca, which was paid over $300,000 by Centerville, settled its liability by agreeing to pay a civil penalty of $55,000, and (3) that Centerville paid no penalty, SchoolCraft argues that the Presiding Officer's penalty assessment is not appropriate under the statutory criteria. *Id.* at 17-19, 21. SchoolCraft also identifies several specific alleged errors in the Presiding Officer's penalty assessment, including that its alleged good faith was not considered. SchoolCraft's Brief at 18-21.

The applicable regulation confers discretion on us to increase or decrease the civil penalty assessed by the Presiding Officer. 40 C.F.R. § 22.31(a). *See also*, *Pacific Refining*, 5 E.A.D. at 612. However, we have held that when the Presiding Officer assesses a penalty that falls within the range of penalties provided in the penalty guidelines, the Board generally will not substitute its judgment for that of the Presiding Officer absent a showing that the Presiding Officer has committed an abuse of discretion or a clear error in assessing the penalty. *Pacific Refining*, 5 E.A.D. at 613*; In re Ray Birnbaum Scrap Yard*, 5 E.A.D. 120, 124 (EAB 1994). In this case, the penalty assessed by the Presiding Officer falls within the range of penalties suggested by the Asbestos Penalty Policy as described at pages 9 through 15 of the Decision Following Remand.[14] The Presiding Officer's analysis is both thorough and well reasoned. Thus, absent a showing of abuse of discretion or clear error, we are disinclined to substitute our judgment for that of the Presiding Officer.

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[14]The Region's proposed penalty and its analysis, which was adopted by the Presiding Officer, provided SchoolCraft with reductions in the amount of the penalty that would not have been warranted had the guidance of the Asbestos Penalty Policy been strictly followed. In particular, the Presiding Officer noted that while the Asbestos Penalty Policy determines the gravity of the violation based upon the total amount of asbestos involved in the whole operation, here the Region proposed the gravity component of the penalty by reference only to the amount of RACM cited in the violation. Decision Following Remand at 10. The Presiding Officer observed that "[i]n this regard Complainant's assessment varies from the asbestos policy to Respondent's benefit." *Id.*

SchoolCraft has not shown that the Presiding Officer abused his discretion or committed any clear error in his analysis. We begin our analysis by first noting the seriousness of these violations due to the risk to human health posed by exposure to airborne asbestos. 38 Fed. Reg. 8,820 (Apr. 6, 1973) (preamble to original asbestos NESHAP). Numerous courts have recognized the seriousness of exposure to asbestos fibers. *See, e.g., Environmental Encapsulating Corp., Central Jersey Coating, Inc., v. City of New York*, 855 F.2d 48 (2d Cir. 1988) ("Exposure to airborne asbestos fibers -- often one thousand times thinner than a human hair -- may induce several deadly diseases: asbestosis, a nonmalignant scarring of the lungs that causes extreme shortness of breath and often death; lung cancer; gastrointestinal cancer; and mesothelioma, a cancer of the lung lining or abdomen lining that develops 30 years after the first exposure to asbestos and that, once developed, invariably and rapidly causes death."); *Reserve Mining Co. v. Environmental Protection Agency*, 514 F.2d 492, 508-509 n.26, *modified*, 529 F.2d 181 (8th Cir. 1975); *United States v. MPM Contractors, Inc.*, 767 F. Supp. 231 (D. Kan. 1990); *United States v. Tzavah Urban Renewal Corp.*, 696 F. Supp. 1013 (D.N.J. 1988). Because exposure to airborne asbestos poses such a serious risk to human health, violations of the regulations set forth in the Asbestos NESHAP, which are intended to reduce the potential for such exposure, must be considered potentially serious violations of the Clean Air Act, which can warrant a substantial penalty.

In this case, SchoolCraft has been found liable for violations of the Asbestos NESHAP, which relate to dry stripping of RACM from the facility and the failure to ensure that the RACM remains adequately wet. Most of the assessed penalty relates to these violations. Because "[w]etting to prevent the release of particulates is the primary method of controlling asbestos emissions during demolition or renovation work," *In re Echevarria*, 5 E.A.D. 626, 633 (EAB 1994), these violations are particularly serious.

SchoolCraft argues, however, that it should not be assessed a substantial penalty because it did not do the work that is regulated by the

Asbestos NESHAP and because Seneca had the responsibility for compliance with the work practice requirements. SchoolCraft's Brief at 22-23. These arguments must be rejected because SchoolCraft had a substantial supervisory role, with authority to direct Seneca's work, including its compliance with the Asbestos NESHAP. Centerville hired SchoolCraft to prepare the specifications for the Cline Elementary asbestos abatement project. *SchoolCraft I* at 4. Those specifications provided SchoolCraft with, among others, the following supervisory powers: SchoolCraft could direct the number of shifts worked during the project; it could discharge the contractor's employees if found to be incompetent or detrimental to the project; its approval was required for the contractor's construction procedure and schedule; and it could halt the abatement work in the event that the contractor was not complying with contract specifications or applicable regulations. *Id.* at 5. Thus, although Seneca was responsible under its contract with Centerville to perform the asbestos abatement work, SchoolCraft had the authority of a supervisor to ensure that the work was performed in compliance with the Asbestos NESHAP. It is therefore appropriate that a substantial penalty be assessed against SchoolCraft for the violations that occurred. Moreover, in this regard, we note that the penalty proposed by the Region, and assessed by the Presiding Officer, did take into account the fact that SchoolCraft was not the only operator. *See supra* notes 6 and 11 (proposed penalty of $20,000, rather than $37,000 had SchoolCraft been the only operator).

SchoolCraft's arguments regarding the proportionality of the penalty assessed against SchoolCraft when compared to the penalties assessed against Seneca and the lack of penalty assessed against Centerville do not show clear error or abuse of discretion. We have held that "'[g]enerally speaking, unequal treatment is not an available basis for challenging agency law enforcement proceedings.'" *In re Spang & Co.*, 6 E.A.D. 226, 242 (EAB 1995), quoting Koch, 1 *Administrative Law and Practice* § 5.20 at 361 (1985); *see also In re Chautauqua Hardware Corp.*, 3 E.A.D. 616, 627 (CJO 1991) (holding that information regarding penalties assessed in other cases does not have "significant probative value" regarding the appropriateness of the penalty

proposed in the present case). Indeed, the Supreme Court has held that "[t]he employment of a sanction within the authority of an administrative agency is thus not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases." *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187, *rehearing den'd*, 412 U.S. 933 (1973). Moreover, where the other proceedings involved prosecutorial discretion in settlement and in the decision to bring an action, as was the case here with Seneca and Centerville, an inquiry into such matters is inappropriate. *See, e.g., In re Briggs & Stratton Corp.*, 1 E.A.D. 653, 666 (JO 1981) ("[Respondent] seeks to compare the penalties assessed by the presiding officer after a hearing with penalties assessed after negotiation with the enforcement staff. Such comparisons are difficult, if not impossible, to make."). The Presiding Officer also correctly observed that "the penalty was calculated in consideration of the gravity of the violations," and it would not be appropriate to reduce the gravity-based penalty in consideration of the relatively smaller profit earned by SchoolCraft as compared to Seneca -- the seriousness of the violation warrants a substantial penalty. Decision Following Remand at 15.

SchoolCraft's other arguments as to alleged errors in the penalty analysis also do not establish any clear error or abuse of discretion.[15] The record does not show that the omission of a penalty reduction for

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[15]SchoolCraft also contends that the Presiding Officer erred in finding that SchoolCraft's income is derived from promising clients that it will ensure that they are in compliance with the NESHAP regulations. SchoolCraft's Brief at 22-23. Reversal of this finding, however, would not change the penalty determination as it was offered as only one alternative reason for not reducing the gravity-based penalty (*i.e.*, the amount of the penalty is appropriate based upon the gravity of the violation, whether or not SchoolCraft in fact derives its income from promising clients that it will ensure that they are in compliance with the Asbestos NESHAP). In addition, given SchoolCraft's substantial role in preparing Centerville's asbestos management plan, in drafting the specifications for the abatement project at Cline Elementary and the supervisory role given to SchoolCraft under those specifications, *SchoolCraft I* at 4-7, the Presiding Officer's conclusion is supported by substantial evidence.

good faith was clear error or an abuse of discretion. The evidence cited by SchoolCraft does not inevitably lead to the inference that SchoolCraft acted in good faith. Instead, that evidence could support the conclusion that SchoolCraft knowingly failed to exercise its broad supervisory powers to require Seneca to comply with the Asbestos NESHAP.[16] Accordingly, we find no clear error or abuse of discretion in the penalty analysis[17] and, therefore, uphold the Presiding Officer's assessment of an aggregate penalty of $20,000 against SchoolCraft.

III. *CONCLUSION*

For the reasons set forth above, a civil penalty of $20,000 is assessed against respondent SchoolCraft Construction, Inc., for five violations of the Asbestos NESHAP. SchoolCraft shall pay the full amount of the civil penalty within sixty (60) days of receipt of this final

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[16]SchoolCraft argues that its good faith is established by the comments of its on-site manager, Mr. Jack Bowman, to the effect that he had been concerned about Seneca's failure to comply with the regulations, Transcript at 132-33, and by the testimony of Centerville's representative to the effect that he was "satisfied with Mr. Bowman's attitude with the school district whenever the alleged violations by Seneca were identified. * * * [H]e was very concerned that Seneca did not allegedly follow the rules and regulations of the EPA as required and as he had put into the specifications." Transcript at 93-94. Significantly, none of this testimony addresses the broad supervisory powers that were granted to SchoolCraft under the specifications or what action, if any, SchoolCraft took to ensure compliance with the Asbestos NESHAP. In short, the testimony cited by SchoolCraft could support the conclusion that SchoolCraft was aware of both the applicable standards and the violations, but took no action to bring the project into compliance and only expressed its concern to Centerville and RAPCA after the violations were discovered. Under these circumstances, we cannot conclude that the Presiding Officer's omission of a penalty reduction for "good faith" was clear error.

[17]In upholding the Presiding Officer's penalty assessment, we do not rely upon the Region's argument that the penalty should not be reduced, and might even need to be "heightened," based on the ground that SchoolCraft has been unwilling to take responsibility for the violations as shown by its continued denial of its status as an "operator." Region's Brief at 19, 25.

order, unless otherwise agreed by the parties. Payment shall be made by forwarding a cashier's check or certified check in the full amount payable to the Treasurer, United States of America at the following address:

U.S. EPA, Region V
(Regional Hearing Clerk)
P.O. Box 70753
Chicago, Il 60673

So ordered.

SCHOOLCRAFT CONSTRUCTION, INC.